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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

STATE OF FLORIDA,

Petitioner,

-vs-

COUNTY OF MONROE,
STATE OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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QUESTION PRESENTED

WHETHER THE FEDERAL EXTRADITION ACT, 18 U.S.C. § 3181, ET SEQ., PERMITS A POLITICAL SUBDIVISION OF A STATE A DIRECT ACTION AGAINST A DEMANDING STATE FOR THE EXPENSES OF EXTRADITION ON THE PREMISE THAT BY INVOKING THE ACT, A STATE WAIVES ITS ELEVENTH AMENDMENT IMMUNITY AND CONSENTS TO BE SUED IN FEDERAL COURT BY A POLITICAL SUBDIVISION OF ANOTHER STATE.

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PETITION FOR WRIT OF CERTIORARI TO THE
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The Petitioner respectfully requests that a writ of certiorari issue to review the en banc judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on May 4, 1982.

OPINIONS BELOW

The following opinions and orders of the lower courts are included in the Appendix to the Petition:

1. Opinion of the United States District Court, Western District of New York rendered September 27, 1979, the order and judgments filed October 1, 1979 and March 10, 1981, in this action.

2. Opinion of the United States Court of Appeals for the Second Circuit, rendered May 4, 1982, in this action.

JURISDICTION

The opinion of the Court of Appeals was entered on May 4, 1982. Rehearing en banc was denied on August 3, 1982. Jurisdiction to review the judgment of the Court of Appeals is conferred on this Court by 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Article III, § 2:

> The judicial powers shall extend to all Cases, in Law and Equity, ...to Controversies between two or more States;...[set out in full in the Appendix hereto]

United States Constitution, Article IV, § 2, Clause 2:

> A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.

United States Constitution, Amendment Eleven:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state or by any citizens or subjects of any foreign state.

Federal Extradition Act, 18 U.S.C., § 3181, et seq.:

[set out in full in the Appendix hereto]

STATEMENT OF THE CASE

This case arose out of the claim, filed by the County of Monroe, in the State of New York, against the State of Florida, Dade County, Florida and the State of New York for expenses incurred in the capture, care, and transmission of a fugitive. Upon request by Dade County, Florida authorities, the State of Florida, through its Governor, made a request pursuant to the Federal Extradition Act, 18 U.S.C., § 3181, et seq. (hereinafter called the Act), to the Governor of the State of New York to return the fugitive. Based upon that request, the State of New York, through its political subdivision, Monroe County, did capture, care for, and transmit the fugitive to officials in Florida. At no time was a request ever made directly to Monroe County from the State of Florida. During its tenure of holding the fugitive,

Monroe County incurred certain expenses. After being denied reimbursement for its expenses from the State of New York, Monroe County filed this action against all the parties involved in the extradition process in the United States District Court for the Western District of New York. Jurisdiction in the trial court was grounded upon 18 U.S.C. § 3195, and diversity of citizenship with the amount in controversy over $10,000. Upon motion of the State of Florida, the District Court entered an order dismissing, for lack of jurisdiction, the County's claim against the State of Florida for the recovery of the expenses incurred by the County. The District Court dismissed the State of New York on several grounds not relevant here. As applied to the Petitioner, the basis for dismissal of the action was Florida's immunity from suit under the Eleventh Amendment. No action

was taken with regard to Dade County and that County is still a party in the lower court, but not in the appellate courts.

Thereupon, the Respondent in this cause of action appealed the order dismissing the cause of action to the United States Court of Appeals for the Second Circuit. The Court of Appeals affirmed that part of the decision that dismissed the claim against the State of New York. However, the court reversed and remanded that part of the order of dismissal that held the Eleventh Amendment barred an action in federal court under Section 3195 of the Act and thereupon found adversely to the State of Florida on the merits. (Newman, circuit judge, dissenting). County of Monroe v. State of Florida, 678 F.2d 1124 (2d Cir. 1982) Florida's petition for rehearing en banc was denied August 3, 1982.

The significance of this petition for writ of certiorari to the Court of Appeals for the Second Circuit is substantial, for if that decision is allowed to stand then it will effect a substantial retreat in the scope of immunity afforded states under the Eleventh Amendment. It could permit political subdivisions of states to sue another state directly, not only for extradition expenses, but for any possible claim where a court might imply that Congress abrogated the state's immunity or where the court finds the state consented to such a suit when it used or complied with a federal statute.

ARGUMENT FOR ALLOWANCE OF THE WRIT OF CERTIORARI

THE FEDERAL EXTRADITION ACT, 18 U.S.C. § 3181, ET SEQ., DOES NOT PERMIT A POLITICAL SUBDIVISION OF A STATE A DIRECT ACTION AGAINST A DEMANDING STATE FOR EXPENSES OF EXTRADITION NOR, BY INVOKING THE ACT, DOES A STATE WAIVE ITS ELEVENTH AMENDMENT IMMUNITY AND CONSENT TO BE SUED IN FEDERAL COURT BY A POLITICAL SUBDIVISION OF ANOTHER STATE.

The majority opinion of the Second Circuit in this case found specifically that Section 3195 of the Federal Extradition Act (the Act), 18 U.S.C. § 3181 et seq. permitted a political subdivision of a state a direct action against a demanding state for the costs of extradition and, specifically, that the State of Florida waived its Eleventh Amendment immunity when it invoked the Act, by seeking the return of a fugitive from the State of New York. This interpretation of the Eleventh Amendment is novel.

Petitioner does not question that part of the majority's opinion that states that Congress has the power granted by Clause 2 of Article IV of the United States Constitution, to regulate matters relating to extradition and to abrogate the states' immunity from suit on claims arising out of extradition. Nor does Petitioner question the finding that Congress, by the language of Section 3195, intended the demanding state to pay the expenses of extradition. However, Petitioner does challenge the holding that Section 3195 permits a political subdivision of an asylum state a direct action against the demanding state and that the demanding state consents to a claim by other than the executive authority of the assisting state in federal court by invoking the provision of the Act.

The Petitioner submits that Congress created a liability of the demanding state

only to the extraditing state. The Federal Extradition Act, originally enacted in 1793, defines the basic obligations of interstate and international extradition. 1 Stat. 302. The duty of the Act, now found in 18 U.S.C. § 3182, states that whenever the executive authority of any state makes a demand "of the executive authority of any State, District or Territory" to which a person has fled, "the executive authority" of such "State" shall cause the person to be arrested and delivered to the demanding state. It is clear from the words of the Act that only the "executive authority" of the asylum state is under a duty to act upon the request of the demanding state. This reflects the constitutional authorization of Article IV. Since only a state can be requested to return a fugitive, it would be clear textual interpretation that the

demanding state's obligation to pay extradition expenses would only inure to the state required to return the fugitive. Neither the Federal Constitution nor the statute permit Florida to make a demand on or impose any duty on Monroe County to return a fugitive demanded by Florida. Nor did Florida ever make any demand on Monroe County.

Furthermore, as Judge Newman said, "it is highly likely that Congress intended to create an obligation for the benefit only of the extraditing state" 678 F.2d at 1136. The Act was enacted in 1793, but a year before that body proposed the Eleventh Amendment to the states. It is unthinkable that they would have impliedly created an enforceable right in a political subdivision against a state in light of the state's prerogatives of the new nation. If Congress had intended an obligation to be

enforceable by a political subdivision for the expense of extradition, Congress could have so stated. Since the Eleventh Amendment became operative, Congress has, on many occasions, amended the extradition laws and have not created any express language creating a right in any political subdivision to collect expenses. "In the absence of clear indication that Congress, in its original or any subsequent enactment, intended to confer enforceable rights upon parties other than extraditing states, courts should not broaden the scope of the implied cause of action for expenses. (Newman, dissenting, 678 F.2d at 1136.) Since Petitioner did not make a demand upon Monroe County, the Act should not be read to create an implied enforceable obligation against Florida in favor of the County of Monroe.

Where looking for intent and purpose, Section 3195 should not be read in isolation from the rest of the Act. It should conform with the intent and purpose of the Act as a whole. Section 3182, as stated before, imposed an obligation on the executive authority" of the state to which a fugitive has fled; Section 3183 speaks to the duty imposed upon the United States representative to return a fugitive to the "executive authority" of the demanding state if the fugitive is found in extra-territorial jurisdiction; Section 3184 speaks to the extradition obligations between the United States and foreign governments; and Section 3185 speaks of fugitives from countries under control of the United States into the United States. All these sections speak of "executive authorities" and their obligations to each other. Nowhere is there any mention of any

lesser authority than the "executive authority". Since all the sections of the Act speak only of the duties of the executive authorities, Section 3195 should be read to mean that the demanding state owes its obligation to pay only to those "executive authorities" involved in the extradition process. While it may have been contemplated that officials of political subdivisions would aid in the arrest and transfer of the fugutive, there is no reason to imply a direct cause of action in a political subdivision without express words in the Act from Congress permitting the subdivision to recover whatever expenses were incurred by it.

Unconsented lawsuits in federal courts against a state are prohibited by the Eleventh Amendment. Alabama v. Pugh, 438 U.S. 781 (1978); Edelman v. Jordan, 415 U.S. 651 (1971). Congress has always had

the power to abrogate a state's immunity in aid of its constitutional powers. Parden v. Terminal Railway, 377 U.S. 184 (1964). However, when Congress wishes to so waiver the states' immunity, that abrogation must be clear in the intent of the congressional act. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). When the intent to abrogate is unclear from a reading of the congressional statute, a state's Eleventh Amendment immunity will be upheld. Edelman v. Jordan, 415 U.S. at 672; Employees v. Missouri Public Health Dept., 411 U.S. 279 (1973). In Edelman v. Jordan, supra, the Court stated the burden that must be overcome to find a waiver of a state's immunity when it said:

> In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where states 'by the most express language or by such overwhelming implications from the text as

> [will] leave no room for any other reasonable construction.' Murray v. Wilson Distilling Co., 213 U.S. 151, 171 (1909); 415 U.S. at 673.

In Fitzpatrick v. Bitzer, supra, the Court found Congress met its burden and clearly revealed a "congressional intent to abrogate the immunity conferred by the eleventh amendment", 427 U.S. at 451, when it adopted the Equal Employment Opportunity Act of 1972 and thus amended Title VII of the Civil Rights Act of 1964 to include government, agencies, and political subdivisions.

Missouri Public Health is instructive. The Court there refused to find a clear indication that a waiver was created by Congress when they found that the state's obligation was enforceable in an action that was not subject to the defense of the Eleventh Amendment. In that case, state employees sued Missouri to

recover overtime compensation due to them under the Fair Labor Standards Act. This Court decided that Congress did not intend to waive a state's immunity under FLSA since the Secretary of Labor could sue for the injured employees and his suit against the state would not be barred by the Eleventh Amendment. As in that case, here another forum exists also. New York can sue Florida under this Court's original jurisdiction to recover the expenses incurred by Monroe County and that action would not be subject to the Eleventh Amendment defense. With this avenue open to the states, it can be interred, like in Missouri Public Health, that Congress did not intend to waive Petitioner's immunity to suit by Monroe County under Section 3195.

In this case, when one looks for the "most express language or...such

overwhelming implications from the text" of a waiver in Section 3195, one cannot help but believe that no waiver was ever contemplated by Congress. Even the majority opinion states that when they say "it is true that the Federal Extradition Act does not (emphasis added) expressly abrogate the states' Eleventh Amendment immunity". 678 F.2d at 1133. Nor can there be found an implied abrogation of the constitutional immunity. If the Act does not expressly waive the states' immunity, then we must see if there is any "overwhelming implications" to find a waiver. Here too, we come up short.

The plain text of Section 3195 says the demanding state must pay the extradition expenses. Again, when read as part of the whole Act, the obligation to reimburse only goes to the state or "executive authority" which is under a constitutional obligation

to return a fugitive. Since no duty can be implied under the Act to bind a political subdivision (nor is any subdivision ever mentioned), there can be no implied right of such a subdivision to make a direct claim under the Act. Since its original passage, Congress has had many chances to amend this section, but it has not done so.

Even though a state may enjoy an immunity under the Eleventh Amendment, it may voluntarily waive that immunity if it consents to a suit that would otherwise be barred, Clark v. Barnard, 108 U.S. 436 (1883), or becomes involved in certain conduct. A good example of the latter is Parden v. Terminal Railway, supra. In that instance, the State of Alabama was found by the Court to have consented to suit when it chose to own and operate a railroad. There the state was acting as a commercial enterprise in a proprietary, not

governmental-policy, function. In so acting, the state was found to have accepted Congress's condition that to operate a railroad it had to be amenable to suit under FELA. Id. at 192. The state could not use its immunity to defeat that condition.

But, the evidence of implied waiver or consent must be strong and

> the mere fact that a State participates in a program through which the Federal Government provides assistance for the operation by the State of a system of public aid is not sufficient to establish consent on the part of the State to be sued in federal courts. Edelman v. Jordan, 415 U.S. at 673.

See also Dept. of Health v. Florida Nursing Home Ass'n, 450 U.S. 147 (1981), where the Court reaffirmed its holding in Edelman.

Here, Florida did not impliedly consent to be sued in federal court by a political subdivision when it invoked the Act to

request the return of a fugitive. Up until the decision of the Second Circuit, all states believed they were working on a governor-to-governor level where their respective "executive authorities", acting under the congressional mandate, used the Act to request the return of a fugitive. Since all disputes concerning the Act can be litigated between the states under this Court power of original jurisdiction, there has never been any reason to believe that by invoking the provisions of the Act (as they must when seeking extradition) any state waived its right to immunity except to the "executive authority" of the extraditing state. Surely no state believed the system of governor-to-governor requests would be "short circuited" and expose them to liability from some unknown political subdivision. Petitioner had no "free choice". If it wanted a fugitive

returned it must comply with the Act. While Florida always was on notice that it may be required to pay the expenses involved in extradition, that notice extended only to the claims put forth by the party obligated to return the fugitive, the "executive authority" of the extraditing state. The waiver to be sued in this Court has always been the only type of suit the states have ever consented to.

Section 3195 should not be so construed that it upsets the relationships between the states or internal state law. The "executive authority" ought to be free to determine how his extradition obligation will be carried out. This means he can choose not to sue a sister state for extradition expenses to avoid friction between the cooperating states. As aptly stated by Judge Newman in his dissent, "Section 3195 should be construed to

reserve to each state the decision as to whether the expenses of its political subdivision ought to precipitate legislation with a sister state. New York should be the sole representative of its sovereign interest regarding reciprocal obligations of the state in cases of interstate extradition." 678 F.2d 1138.

Judge Newman's statement conforms to this Court's holding in New Jersey v. New York, 345 U.S. 369 (1953) (per curiam). In that case, a political subdivision was not allowed to intervene in a suit between New York and New Jersey within this Court's original jurisdiction because a state should be the sole representative and determinator of its interests on matters of sovereign dignity. This theory has no less impact on the issue in this case. Extradition has always been a matter of sovereign dignity. The Act speaks solely

to the obligations of "executive authorities" and makes no mention of any right or duty in any lesser political authority. Since extradition is an obligation only between the states, the states, and not a political subdivision, should be the sole representatives of their sovereign interests. New York has always had the option, in this case, to pay Monroe County for the expenses incurred and then seek reimbursement from Florida, and if need be, sue Florida in this Court if Florida refused to reimburse New York. "This Court ought not to assume that Congress, without expressly stating such an intention, meant to permit political subdivisions to preempt each state's opportunity to elect or forego litigation on a matter of sovereign interest." 678 F.2d at 1138 (Judge Newman dissenting). What must be assumed is that Congress

intended one uniform rule of law leaving to the states themselves all decisions concerning litigation with other states on matters of interstate extradition.

Finally, Judge Newman points out a helpful analogy in his dissent. He compares the obligation of extradition between two sovereign states with the duties under a treaty between two sovereign nations. As treaty obligations are construed to run only between the contracting parties, extradition obligations must be construed to run only between the contracting states. And, as individuals are not permitted to enforce a treaty, political subdivisions are not permitted to enforce the reciprocal obligations under interstate extradition. "States are acting in their most sovereign capacities when they deal with each other on matters of interstate extradition.

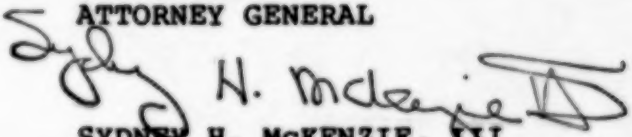
Federal legislation regulating such relationships is fairly to be analogized to a treaty." 678 F.2d at 1139 (Judge Newman dissenting).

CONCLUSION

The question of whether 18 U.S.C. § 3181, et seq., permits a political subdivision to bring a direct action against a demanding state in federal court on the premises that, by invoking the Act, a demanding state waives its Eleventh Amendment immunity far transcends the amount of money requested to pay the extradition expenses of Monroe County which is involved in this case, and goes to the fundamental constitutional protections afforded the states. This significant change in the law and the resulting confusion wrought by the Court of Appeals decision merits the granting of certiorari.

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

JIM SMITH
ATTORNEY GENERAL



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